United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2055

TO BE ARGUED BY
NANCY ROSNER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

WARDEN, GREEN HAVEN STATE PRISON,

Respondent-Appellant,

OSWALD, JONES, MACKELL, LUDWIG, et al.

Defendants-Appellants,

-against-

THOMAS PALERMO, et ano.,

Petitioners-Appellees.

- -X

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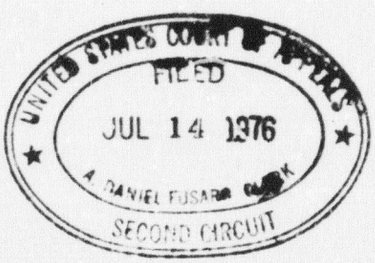
THOMAS PALERMO



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STATEMENT OF THE CASE

Since the State takes issue with the sufficiency of the evidence to support the district court's factual conclusion, a detailed exposition of the evidence is necessary.

TESTIMONY OF THOMAS PALERMO

On February 17, 1969 THOMAS PALERMO and SHELDON SALTZMAN were on trial in Richmond County Supreme Court. Saltzman, who was supposed to drive Palermo to Court, called to say he had been in a car accident and would be delayed. In fact, as Saltzman admitted in the district court, he was one of several men* who robbed the Provident Loan Society that morning.

Palermo and Saltzman were convicted of the Richmond robbery. Rather than being sentenced in the normal course of events, the sentences were repeatedly adjourned and used as leverage by the Queens District Attorney's office to compel cooperation in the solving of the Provident robbery. Thus, there was evidence that Detective O'Connor and Queens Assistant District Attorney Thomas Demakos had "taken the liberty" of speaking to Judge Kern (T40)**.

According to Detective O'Connor if Palermo and

*Palermo has denied his complicity and Saltzman has testified that Palermo was not involved. In fact, the other participants have never been apprehended. Despite the State's none too subtle implications that Palermo participated in that robbery, they failed to offer any proof to impeach his testimony in the district court that he was not involved apart from his own plea of guilty.

**Numbers in parentheses proceded by "T" denote pages in the transcript of the hearing in the district court.

Saltzman would effect the return of the jewels, Judge Kern would sentence them to no more than ten years. The liberty O'Connor and Demakos took was that of Palermo and Saltzman. After an unsuccessful round of negotiations,* Palermo was sentenced to 0-25 years and Saltzman, a first offender, was sentenced to 0-15 years in Richmond County.

The Queens District Attorney's power to affect the Richmond County sentence is conclusively demonstrated by one almost successful agreement. On June 27, 1969, after Palermo had learned of Saltzman's involvement with Provident, they struck a bargain of five years for Palermo and three years for Saltzman in return for the return of the jewels. That day Queens Assistant District Attorney Demakos was ill and Queens Assistant District Attorney Gaudelli was sent to Richmond County in his stead. Though the defendants and their counsel, the Richmond District Attorney and the judge all approved the deal, Gaudelli would not ratify it, wanting seven years for Palermo and five years for Saltzman which the defendants did not accept. Without the Queens District Attorney's ratification Judge Kern would not accept the agreement and on that day Palermo and Saltzman were

*Palermo was unaware of Saltzman's complicity in the Provident robbery and consequently, of his ability to effect the return of the jewels until their arrest in Queens in May, 1969.

sentenced in Richmond (T47).

Soon after Palermo and Saltzman were sent to Sing Sing to start the running of their time in state prison and were almost immediately returned to the Queens County House of Detention where the second round of negotiations began. At first the focus of the parties efforts was a motion to reduce the Richmond County sentence which they eventually concluded was jurisdictionally barred by the defendants' removal to state prison.

With the sentence thus beyond the judge's power to alter, the parties turned their attention to the only other avenue for abbreviating the term of incarceration, the parole board.

The first proposal concerning the parole board was made by Capt. O'Connor accompanied by Jacob Evseroff in a visit* to Palermo at the Queens House of Detention.

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*The smear tactics employed throughout the state's brief warrant brief comment here. The state attempts to impeach the testimony of both Palermo and Evseroff with the observation that each claims this series of two meetings to have taken place at the others request. Apparently, the state does not dispute that they did take place and O'Connor was present. In fact, there is no conflict in the testimony as to how they came about since Evseroff testified that he believed the second meeting to have been at Palermo's request (T332). O'Connor's version of the events is lacking since he failed to testify in the district court and denied having any discussions with Palermo in his answer.

Equally unfounded, if not malicious is the state's attempt to smear Mr. Evseroff's integrity because his part in the negotiations, if successful, would have resulted in a fee for Provident's insurer. The very canon of ethics relied on by the state for their character assassination clearly states that such conduct does not constitute a conflict of interest if the details are disclosed to the client which was clearly the case here (Appellant's brief at 24-25.)

According to Palermo, O'Connor reported that Ludwig had called Parole Commissioner Jones and gotten a commitment for parole after a total of eighteen months incarceration (T62-64). This version of the events was fully corroborated by Mr. Evseroff's testimony (See infra). As previously noted Mr. O'Connor did not testify.

After another trip with Mr. Evseroff, and after visiting with Saltzman alone (T70), which was corroborated by Saltzman's testimony (see infra), O'Connor appeared at the Queens House of Detention accompanied by Palermo's co-counsel Edward Bobick and Norman Rein who was representing Provident and their insurer (T72). Though his company changed, his theme remained the same.

On October 24, 1969, O'Conner, Bobick & Rein appeared at the jail. O'Connor reported that Provident was on the verge of bankruptcy. If that occurred, further negotiations would be futile. A final offer was made incorporating the provision for parole in eighteen months. Accompanying the offer were threats by O'Connor that if the deal were not accepted other people would be arrested and Palermo would be made to look like an informant (T73).

Acutely aware of the possibility of fraud and lack of good faith, Palermo asked to speak to Chief Assistant District Attorney Frederick Ludwig himself (T82).

(Ludwig's testimony fully confirms the fact that this meeting occurred. (see infra)). Ludwig confirmed the deal (T82).

Palermo was incarcerated long enough to make some phone calls to arrange the return of the jewelry, and to be feted with a steak and drinks upon the successful completion of the mission (T83-84).

The next step in the fulfillment of the bargain was the pleas of guilty of Palermo and Saltzman in Queens on April 16, 1970.

Palermo and Saltzman were scheduled to appear before the parole board on April 28, 1970, even before the imposition of the suspended sentence in Queens which was part of their bargain. However, because Commissioner Jones was not sitting on that panel, Palermo and Saltzman were brought back to Queens with the District Attorney's consent to avoid their appearance before the April board. (T96-98 & 120).

On June 3, 1970 Palermo and Saltzman appeared before the parole board at Sing Sing. With utter naivete each separately related to the parole board their promises of parole after eighteen months incarceration which would have meant release in August, 1970:

COM. GROSS "Q. Thomas Palermo?
A. Yes sir.
Q. Have a seat Thomas. You know the reason for your appearance here this morning?
A. Yes.
Q. This isn't your parole hearing. This is the time we set your minimum term of imprisonment.
A. Yes.

Q. At a future date you will be coming in discussing parole. Are you aware of that?
A. No, I wasn't sure of that.
Q. That's the way it is. You were given a maximum sentence not a minimum.

COM. REGAN Q. What was your understanding?
A. I was told that when I came up here because of the cooperation that myself and my codefendant--had returned approximately $4,000,000 in diamonds that we would see a board at the minimum date and that we would be given a year sentence to do in prison which would include another two months and that--

COM. LEWIS Q. Who told you that?
A. The District Attorney, my lawyer, the lawyer for the corporation who handled the jewelry, Mr. Ryan.
Q. You have it in writing?
A. I have it by my attorney in an affidavit.
Q. Well, the District Attorney or the judge can't commit this Board.
A. I understand that, sir.
Q. This is a function the Board has to exercise, and we will exercise.
A. I was told that, but I was told the Parole Board had been spoken to, I don't know if it was true, this was told to me by Mr. Mackel and the assistant, Mr. Ludwig. As I had experience with this Board before, you have the record?

COM. REGAN Q. Yes.
A. and I was, I told them the same thing, how can you make a guarantee for somebody. They said well we spoke with the Commissioners and they said they would as long as you have us under supervision for the term that they can decide and they can put us on the street. I said yes and they said if you return the stuff that they would be willing, you know, that although you couldn't legally be considered at this time, I understand there were several meetings taken place in the city with the District Attorney, my lawyer, and some members of the Parole Board. I don't know how true it was, I wasn't there. This is only what I was told, and I was also told that being they have the jurisdiction to take you off the street even without a crime.
Q. There is nothing in our record that indicates any member of the Parole Board conversed with you, your lawyer, or the District Attorney?

A. I don't know, as I said, sir, I wasn't there. This is only what I was told, you know, and this was the reason why I and my codefendant returned the stuff, this is what we were told.

Q. Okay.

COM.GROSS Q. How are you getting along in here, Tommy?

A. Good, no trouble.

Q. You got a clean sheet here.

COM.GROSS: Do you have anything you like to ask, Mr. Lewis?

COM.LEWIS: Yes.

COM.LEWIS Q. Well, I want Palermo to be abundantly clear that the Board of Parole handles every case as an individual case, and takes into consideration whatever cooperation you did offer law enforcement people in the solution of what was obviously a serious crime. However, while these may be viewed as mitigating circumstances they don't mitigate the fact that a serious crime did occur which you perpetrated and for which the Court sentenced you to a maximum term.

A. Yes, I understand that.

Q. of rather long duration.

A. I understand.

Q. The Board will have the responsibility of setting the date as a result of this hearing, the minimum period of imprisonment at which time we will talk to you about parole. Generally, and in any case that is transacted under that heading of minimum period of imprisonment hearing, a release doesn't eventuate. We will set a minimum period at which time you come back before the Board to talk about parole, and that doesn't mean that necessarily that you go out then, and this is the process.

A. Right.

Q. Anything you want to ask about that?

A. No, sir. I understand, it's just like I said it was an agreement into which I was led to believe, I thought this would be the understanding prior to getting here. As I said I had experience with the Board before and I expressed this and all along the line I was assured that they had said I would only do the mandatory time as required by law, behind the State prison law, and that I would have to do the year and that's what I will do, and at that time that's what they said. I can't help it, I was led to believe this. You know naturally I am sorry if it was a misunderstanding because I am the one who is suffering for it, you know."

(Minimum period of imprisonment hearing - Thomas Palermo) (48-49a.)*

*Numbers in parentneses followed by "a" denote pages in the appendix.

Far from ordering release in August, 1970, Palermo's next date to see the parole board was fixed at June, 1976.

Saltzman's experience was similar. After stating that he had been promised parole in eighteen months and being informed by the board that the promises were meaningless, Saltzman summed it all up in a phrase:

> "Q. Is there anything you want to ask us?
> A. No.
> Q. We will set the date.
> A. I am stunned."
> (Minimum period of imprisonment hearing - Sheldon Saltzman) (55a).

Still refusing to believe the utter breach of faith and fraud to which they had been subjected, Palermo and Saltzman contacted their counsel. Soon it became apparent that the district attorney's office had no intention to fulfill their promise and, on September 30, 1970, still before the imposition of sentence in Queens, Palermo moved to withdraw his guilty plea, setting forth in all its lurid detail the endless permutations and variations of deals and visits just as he did in the district court. (58a-76a).

In response to Palermo's motion, the district attorney's office admitted that a deal had been made but claimed that the commitment was only to use their "best efforts" to persuade the parole board. Palermo, as did the district court, found this position inherently incredible:

> "D.A.'S "BEST EFFORTS"
> A.D.A Jerome M. Pines in an affirmation dated October 8, 1970 in substance takes the position

> that the only promise that D.A. Mackell made to Mr. Palermo was that if Palermo was instrumental in returning $4 million worth of valuables that he, the Queens County District Attorney, Thomas J. Mackell, would use his "Best Efforts" to assist Thomas Palermo in his many criminal court problems. This is ludicrous. I am 29 years old - I have spent ten years of my life in prison - I regard myself as an experienced and hardened bargainer. In this case the Queens D.A., his chief assistant and two top notch ADA's represented the people of New York. Upon information and belief, they also received counsel and advice from learned and distinguished members of the judiciary. My crew of jailhouse lawyers and myself are no competition for this high class legal talent.
>
> Yet - I am sure that no court in this land - will find as a fact that I am stupid enough to become involved in a transaction in which not only does my liberty depend but my entire life - where I would trade $4 million of valuables for the Queens District Attorney's "Best Efforts." Obviously, my version is correct."

(Amended and supplemental affidavit of Thomas Palermo, December 11, 1970.) (75a).

Though it was by far the most significant, the lies with respect to the parole board were not the only breach of faith by the district attorney's office. There ensued a pattern of subsequent similar acts probative of the bad faith which infected all the representations made to Palermo and Saltzman.

Thus, part of the deal involved the promise of a suspended sentence in the Queens case, a consideration not unreasonable in light of the cooperation given in that case.

Palermo had been told that the sentencing judge, Farrell, had been spoken to and given his commitment for the sentence.

Under oath, on the hearing to withdraw the plea in Queens County Supreme Court, both Mackell and Ludwig denied both speaking with the court ex parte and getting the commitment for a suspended sentence and denied communicating that to the defendants. However, Ludwig communicated both of these things to an attorney in the firm of Rein, Mound & Cotton, Alfred Leimon who made contemporaneous memoranda of those facts. (See testimony of Leimon, infra). Unfortunately for Palermo, Leimon's memoranda was not available to prove the perjury of Ludwig and Mackell in the State court proceeding and the impartial finder of the facts there, Judge Farrell, found that he had never made such a commitment and no such commitment had been conveyed to the defendants. Nevertheless, Judge Farrell imposed a suspended sentence in January, 1971.

Nor did the abuses and frauds end there. A further part of the bargain was the promise of an unconditional discharge for Palermo in a case pending in Utica, New York. (T90-93). Again Ludwig testified under oath in the district court that no such representation had been made. And again, thanks to the meticulous contemporaneous memoranda of Mr. Leimon, Ludwig was proven a liar. (See testimony of Leimon, infra).

After exhausting himself and his remedies in the state courts, Palermo petitioned the federal court for relief. The history of his litigation in these courts is set forth in the Appellant's brief.

TESTIMONY OF MACKELL

Mr. Mackell testified that at all relevant times he was the District Attorney for Queens County with higher political asperations. He was seeking the New York State Gubernatorial nomination (T147). In light of his extensive background in criminal law and in politics (T146), he was acquainted with parole commissioners Oswald and Quinn and knew Norman Rein since the 1940's (T149-150).

Though the state makes much of Palermo's obvious lack of knowledge of the workings of the parole board and charges him with constructive knowledge of the district attorney's inability to deliver on their commitment, it is interesting to observe that Mr. Mackell, the chief prosecutor of Queens County did not know the law regarding the impact of a maximum sentence (T151) and, in fact, after reading the statute still misinterpreted the law (T153). So much for the contention that Palermo must have known that the district attorney's representations were false and therefore could not have relied on them.

Mr. Mackell testified that he personally had no dealings with the defendants or their counsel. However, he confirmed that he authorized his chief assistant, Ludwig, to negotiate for reconsideration of the Richmond County sentence after it had been imposed and could not remember, but thought it possible that his office had intervened in the Richmond presentence. (T157-158-169). He also testified that after Richmond County refused to alter the sentence there the logical thing to do was to turn to the possibility of doing this through the parole board (T172).

Regarding the promises made to Palermo in connection with the Queens case, he testified that his office represented that it would recommend the utmost leniency which was a suspended sentence (T177-187). This testimony flies in the face of his sworn testimony in the state court proceeding that no such representation was made to Palermo. Like Ludwig, he also denied that any arrangements had been made with Judge Farrell prior to the Queens sentencing. (T177).

Like Ludwig, Mackell said the only representation with respect to the parole board were "best efforts" (T167). However his investigation to determine what could be done along those lines was far from exhaustive. He testified he did not believe he would have done anything but write a letter. (T197). Yet Commissioner Oswald testified that people

frequently met with parole board members to discuss specific cases (T390-410) but Mackell made no such request (T413).

The state makes much of the monetary incentives Evseroff and Bobick had to misrepresent the situation to Palermo. These paltry sums of $25,000 and $50,000 pale by comparison with the four million dollars and 2200 votes that the pretender to the New York Gubernatorial nomination had to motivate his representations.

CAPARELL'S TESTIMONY

Caparell testified that he was assigned to the Queens District Attorney's Office and Ludwig was his immediate supervisor (T206-208). He confirmed that although he was not a party to them, the Queens District Attorney's negotiations or discussions in Richmond County began prior to the sentence then. (T208-231).

It was Caparell who initially contacted McCarthy of the Special Services Department of the parole board and who attended the meeting with Rein, Leimon and Commissioner Jones of the Parole Board (T210). Despite the state's present contention that it was absurd and naive for Palermo to assume that the District Attorney's office could have a commitment from the parole board it was to seek just such a commitment

that the meeting with Jones was arranged (T215). "Mr. Leimon asked Commissioner Jones,...would there be certain commitments made..."(T215). Even more surprisingly, despite the state's efforts to portray this meeting, Commissioner Jones didn't say no, he said he would take it up at the next meeting a month later in Albany (T215). Clearly one of the issues discussed with Commissioner Jones in that meeting was the minimum possible time after which Palermo and Saltzman could be released (T216).

Regarding the promises made to Palermo and Saltzman with respect to their sentences in Queens County, he testified that it was possible that he had told Mr. McCarthy at the time that Palermo and Saltzman had been promised suspended sentences in Queens (T256).

LUDWIG'S TESTIMONY

Mr. Ludwig's testimony was brief and to the point. If the point is that official position is no guarantee of honor, integrity or honesty.

Regarding the representations made to Palermo and Saltzman with respect to the sentencing in Queens County, Ludwig testified that Judge Farrell had not been approached off the record before sentence; that the district attorney's office would urge lenient treatment but had no commitment from

Judge Farrell and that no such commitment was conveyed to Palermo and Saltzman (T261-263,278-279).

Regarding the promises made to Palermo with respect to the Utica case, Ludwig testified that he got no commitment from District Attorney Darrigrord in Utica and never told anyone at the firm of Rein, Mound & Cotton that he had.(T269).

Regarding the Queens District Attorney's Office's involvement with the Richmond sentence, Ludwig testified that Queens Assistant District Attorney Gaudelli's presence there was merely as an "observer" and Ludwig had no specific motives in sending them (T270-273).

Regarding his communications with the parole board, Ludwig first testified that any communications with Mr. McCarthy were "certainly not in connection with this matter." (T275). After being confronted with McCarthy's contemporaneous memorandum of the conversation Ludwig had no recollection "one way or the other." (T275). The substance of the conversation, that he agreed with McCarthy that Palermo should get no consideration from the parole board did not refresh his recollection (T276-277).

Ludwig certainly fulfilled his promise to use "best efforts" with the parole board - his best efforts to see that Palermo was never paroled.

SALTZMAN'S TESTIMONY

Saltzman testified that Palermo was not involved in the Provident robbery (T283) and only told Palermo of his involvement after their arrest in Queens in May, 1969 (T289). He confirmed the substance of the various negotiations as related by Palermo either through his own participation in them or Palermo's contemporaneous recital of the events.

In addition he testified that O'Connor had seen him alone and guaranteed a maximum of eighteen months in jail. (T304-305).

EVSEROFF'S TESTIMONY

Evseroff confirmed the meeting with Palermo and O'Connor as Palermo had testified. Most importantly he confirmed that Palermo had requested that they check on the parole board's commitment. To do that he and O'Connor went to Ludwig's office. Ludwig left their presence to call the parole board (T325). He returned and said that the parole board indicated that, "on his recommendation, assuming that Palermo was to assist in the return of the property, they would arrange an early parole of him, and that he was told that Palermo would have to do at least a year and then be on parole for five years thereafter." (T325).

LEIMON'S TESTIMONY

Mr. Leimon testified that he had known Howard Jones since 1946 and had participated in the meeting with him in connection with the Provident negotiations. After it became clear that the Richmond sentence could not be reduced the parole board meeting was arranged to get a commitment from them (T342-343). At that meeting Commissioner Jones was told that Palermo was seeking a maximum of eighteen months incarceration. Jones said he would take it up with the other commissioners to see "if they could get some kind of informal consensus." (T360). Jones did not say it was impossible (T360).

Regarding the promises made to Palermo about the Utica case, Leimon testified "Mr. Caparell told me that the Queens District Attorney's Office completed a call to Utica and spoke to the chief assistant district attorney or the district attorney up there about Palermo's case. 'They now have a commitment from Utica that Palermo will be permitted to plead to a misdemeanor and will receive a suspended sentence.'" (T362). Leimon was quoting from a contemporaneously made memorandum of the conversation which puts the perjury to Ludwig's testimony.

Soon after this conversation Bobick complained that something was wrong and Leimon spoke to Caparell who reconfirmed the Utica deal, thus putting the perjury to Caparell's denial as well. (T363-367).

Leimon also confirmed that he had spoken to Mackell about Palermo which Mackell denied under oath in the district court. (T368).

Regarding the promises made to Palermo and Saltzman about their Queens sentencing, again Leimon's contemporaneously made memoranda of the conversation put the perjury to Ludwig's testimony. Leimon testified that Ludwig said he had an "understanding"with Judge Farrell (T372), and had had a private conversation with Judge Farrell before the sentencing:

"So I excused myself and I went back with Ludwig into his private office and I said, 'Freddy I know that the judge won't make a commitment in open court as to what sentence he will give.'

I know that from my experience from years ago, and I gather that judges are very gunshy about saying anything in open court that they might not be able to fulfill later on.

However, I said, 'Did you have any private conversation with Judge Farrell in which you got the commitment that had been told to me about the suspended sentence?'

He said, 'yes, I did. I spoke to him privately.'

I said, 'Dead sure?'

He said 'Dead sure.'

(T375-376).

So much for Mr. Ludwig's credibility and the alleged absurdity of the district court for disbelieving him.

Although Mackell denied saying it and Ludwig denied repeating it, Leimon confirmed that for Mackell the motive for his negotiations was 2200 votes (T380).

Finally, Leimon accurately characterized and confirmed the district court's judgment concerning the credibility of Ludwig in particular and the Queens district attorney's office in general:

"When I say, 'He added in typical Ludwig fashion' I think he was prone occasionally to exaggerate." (T381).

"The difficulty is that even if I get a commitment by telephone on one day, everybody in the Queens district attorney's office conveniently forgets it the next. I have gotten to the point where I simply do not believe any oral statements emanating from that office." (T383).

Really, that sums up the case.

OSWALD'S TESTIMONY

Commissioner Oswald confirmed that Commissioner Quinn had, in fact, been called by Mackell on Christmas Eve because he was easier to reach than Oswald. (T394-395). Mackell denied this.

Oswald also confirmed that a personal meeting between members of the parole board and the Queens district attorney's office could have been arranged but was never requested. (T410-413).

So much for their "best efforts."

MC CARTHY'S TESTIMONY

Commissioner McCarthy's testimony was the coup de grace.

He confirmed that Caparell had told him that Palermo had been promised a suspended sentence in Queens (T424). Ludwig and Caparell had denied this under oath in the district court.

Most importantly, he had written a memorandum at the time which reflected a phone call on or about October 25, 1969 from Mr. Ludwig to himself. (It must be recalled that the jewels were returned on October 24, 1969 so that Mr. Ludwig's haste to fulfill his admitted obligation of "best efforts" can be fully appreciated.)

Mr. Ludwig told Mr. McCarthy that "this case in effect reminded him of the Murf the Surf case in Florida wherein some leniency was given to Jack Merf, the Surf and he subsequently killed somebody down there." (T439).

Mr. McCarthy said he didn't feel Palermo was entitled "to consideration of any type whatsoever by any agency."(T425).

And Mr. Ludwig agreed with him. (T425-426).

And that agreement was circulated everywhere (T430-431).

Little wonder Mr. Ludwig couldn't recall having called Mr. McCarthy the day after the jewels were returned.

POINT I

THE DISTRICT COURT'S FACTUAL FINDINGS WERE SUPPORTED BY AMPLE CREDIBLE EVIDENCE

As set forth in the statement of the case, there was ample non-hearsay evidence from Palermo, Saltzman and Evseroff that Ludwig and O'Connor had represented that the parole board had made a commitment to release Palermo and Saltzman after eighteen months. The district court's justification, if not compulsion, in accepting the petitioners' testimony as to the details of their agreement is amply set forth in the statement of the case.

POINT II

THE PLEA BARGAIN HERE WAS FOR A DEFINITE MAXIMUM PERIOD OF INCARCERATION. IT IS ENFORCEABLE AND THE PETITIONERS ARE ENTITLED TO THE BENEFIT OF THAT BARGAIN.

In Santobello v. New York, 404 U.S. 257 (1971), the Supreme Court states:

> "...when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Id. at 262 (emphasis supplied).

Implicit in the Court's decision was the underlying public policy considerations which mandate fairness in securing agreement between an accused and a prosecutor.

> "Due process...means...the plea reflects the considered choice of the accused, free of any factor or inducement which has unfairly influenced or overcome his will.

United States ex rel. Elksnis v. Gilligan, 256 F.Supp.244,253 (S.D.N.Y. 1966)(emphasis supplied, footnotes omitted).

A plea may be unfairly influenced by a prosecutor through misrepresentation, including unfulfilled or unfulfillable promises, or by promises that are by their nature improper. Shelton v. United States, 246 F.2d 571,572 n.2 (5th Cir.1957), rev'd on confession of other error, 356 U.S. 26 (1958).

In United States v. Carter, 454 F.2d 426 (1972), cert den. 417 U.S. 933 (1974), the defendant alleged in his motion to dismiss a ten count indictment, that he was promised that in exchange for his cooperation in apprehending and convicting other defendants in that district, he would not be prosecuted elsewhere for any crime arising from the stolen checks. Although the court recognized that the Assistant United States Attorney for the District of Columbia had no authority to grant immunity from further prosecution in the federal system, without the approval of the court pursuant to express statutory authorization, it concluded, nonetheless:

> "...that if the promise was made to the defendant as alleged and defendant relied upon it in incriminating himself and others the government would be held to abide by its terms."

See also United States v. Paiva, 294 F.Supp 242 (D.D.C. 1969); United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973).

Even when a plea bargaining prosecutor acts in good faith, the court will not hesitate to overturn a guilty plea if it finds that the prosecutor has not observed "the most meticulous standards of both promise and performance." Coneale v. United States, 479 F.2d 944,947 (1st Cir. 1973). In Coneale there was a factual dispute as to exactly what the United States Attorney had promised the defendant in return for his guilty plea. In holding for the defendant the Court of Appeals stated:

> If, on the other hand, the 4-to-8 year

> [sentence] recommendation was specifically promised, the defect is equally fatal, if being impossible of fulfillment. (Id. at 946-47).

The Court further stated:

> Prosecutorial misrepresentations, though made in good faith, even to obtain a just, and here a mutually desired end, are not acceptable.

The proposition that the government can be bound, within the context of the plea bargaining process, by improper, unauthorized or unfulfillable promises made by its agents has been applied in various circumstances. See, e.g. In Re Kelly, 350 F.Supp 1198 (1972) (U.S. Attorney's promise of immunity); Pelkington v. United States, 315 F.2d 204 (1963) (Incorrect advice given by judge as to maximum sentence); Smith v. United States, 321 F.2d 954 (1963) (Incorrect advice given by judge as to minimum sentence); Crawford v. United States, 219 F.2d 207 (1955)(Police officer's promise not to prosecute wife of defendant).

Thus, the growing body of case law indicates a judicial awareness that improper, or unauthorized promises made by a prosecutor must be fulfilled if such promise induced the defendant's guilty plea. The public policy considerations which underlay the Supreme Court's decision in Santobello, supra, mandate that the integrity and viability of the plea bargaining process not be undermined by permitting prosecutors to induce guilty pleas by striking bargains which they know, or should know, cannot be fulfilled.

The respondent's reliance on People v. Campbell, 35 N.Y.2d 227, 360 N.Y.S.2d 623 (1974) for the proposition that a prosecutor's unauthorized promise in a plea bargaining situation is without lawful effect is entirely misplaced. In Campbell the court found that the defendant's plea was not induced by the off-the-record promise. This finding was based on the record of the detailed plea arraignment, wherein defendant stated unequivocally, that his plea was not induced by any other promise. More significantly, the Court inferred that it might have reached an opposite result if there had been such a detailed plea arraignment.

> The detailed recorded plea arraignment here is unlike some minimal pro forma questioning which perhaps should not bar a defendant from re-opening the matter despite a superficially contradicting record. Id. at 636-37. (emphasis supplied, citations omitted).

The detailed plea arraignment, on which the court relied on so heavily in Campbell, is in stark contrast to the facts of the instant case, which show that the "promise" made by the Queens District Attorney's Office undeniably induced the actions taken by the defendants. Moreover, at every opportune moment the defendants have attempted tc make known their rights under the agreement, in contrast to the stony silence of the defendant in Campbell.

Respondent cites United States v. Boulier, 359 F.Supp 165 (1972) to support the proposition that a United States Attorney in one district cannot bind his counterpart in another district, and therefore the Queens District Attorney could not make and binding promise in connection with the Richmond County sentence. In Boulier, however, the defendant moved to have an indictment pending in the Eastern District of New York dismissed on the ground that the United States Attorney for the Southern District of Florida had agreed to dismiss the indictment pending in New York. Under these circumstances the District Court properly refused to dismiss the New York indictment. The effect of the unauthorized promise was never raised in the Florida action since the defendant refused to perform the terms of his bargain. The Boulier case bears no relevance to the instant action in which the defendants, who have performed their part of the plea bargain, seek enforcement of their agreement with the State of New York.

Clearly, fulfillment of the plea bargain wherever possible is desirable to insure the integrity of the plea bargaining system which is absolutely fundamental to the criminal justice system as we know it. The state's characterization of the problem as ultra vires is misleading and mischaracterizes the issue. Thus, the question is not whether the Queens district attorney's office had the authority to bind the parole board. It is undisputable in this case that, in fact, they lied when they did so. The issue is whether the result of intended effect of the bargain can be achieved. It is this to which the petitioners were entitled. Thus, the issue is length of incarceration, a sentence promise and nothing more. The state is not entitled to longer custody than they promised, regardless of how they represented they would achieve that. Surely, no one would question the district attorney's power to promise, or the court's power to enforce a sentence reduction in return for cooperation. That is the grease that lubricates the very machinery of the criminal justice system. No more was done here and the petitioners are entitled to specific enforcement of their bargain.

In Commonwealth v. Zuber, ___Pa.___, 353 A2d 441 (1976) 19 Cr.L. 2019, the Pennsylvania Supreme Court took such a view. There a parolee pleaded guilty to murder upon a representation that his sentence of 7-15 years would run concurrently with,

or include, 4 1/2 years served prior to the parole violation. Unfortunately, this agreement was unlawful because the statute required any sentence imposed as the result of a violation to run consecutively without credit for time served prior to the violation. The court found that the defendant was entitled to the benefit of his bargain which was accomplished by simply reducing his sentence.

Just such an agreement was struck here and just such a means was available to the district court to enforce the bargain.

POINT III

THE CONSIDERATION OFFERED BY THE PETITIONERS AND ACCEPTED BY THE STATE WAS LAWFUL. THE PETITIONERS FULFILLED THEIR AGREEMENT AND THE STATE WAS PROPERLY COMPELLED TO HONOR ITS WORD.

The state's argument here reduces itself to the proposition that the petitioner had no right to withhold stolen property and therefore offered no consideration in return for their plea bargain. This is both factually inapposite and legally incorrect.

The petitioner Thomas Palermo denied his involvement in this robbery, this was corroborated by Sheldon Saltzman and no proof to the contrary was introduced to impeach their testimony. This case is analogous to a plea bargain where consideration on sentence is shown in exchange for testimony. Legally, a witness has no right to refuse testimony or withhold information since his Fifth Amendment privilege can be fully displaced by a grant of use of immunity. Despite the state's ability to compel precisely the same result, consideration on sentence in return for such cooperation is compliance.

Application of the above concepts to the instant case mandates the conclusion that the plea bargain agreement between Palermo, Saltzman and the Queens District Attorney

was lawful and enforcible.

While awaiting sentence on the Richmond County conviction, Palermo was approached by the Queens District Attorney, who believed Palermo possessed knowledge relating to the robbery of the Provident Loan Society in Queens County. In exchange for information concerning this crime, the Queens District Attorney made certain "promises" to Palermo and Saltzman. This transaction is clearly analogous to one in which a prosecutor, in exchange for information about a particular crime, grants immunity to a person allegedly involved in the crime. There is no valid basis, in either law or public policy, to label the exchanged information unlawful in the plea bargain transaction while it is unquestionably lawful consideration in a grant of immunity transaction.

Respondent's contention that "this case is analogous to a 'bargain' made with kidnappers who hold hostages at the time the 'bargain' is reached." (47) is totally misguided. Promises made to an apparently unstable person who might be holding the sharp edge of a knife to an innocent hostage's throat cannot be likened to the six months of detailed negotiations for information concerning items of jewelry. Surely there is distinction to be drawn between negotiations conducted under threat of death and negotiations for information initiated by a district attorney. In United States v. Gorham, 523 F.2d 1088 (D.C.Cir. 1975), cited by respondent as applicable to the instant

case, the "negotiations" were conducted under the following conditions:

> "Director Hardy entered the cellblock held by appellants and their cohorts and was promptly captured. During the next twelve hours he was the object of numerous dramatic threats; at various times inmates held a pistol to his head, bound and beat him on the arms, hands and head with a hammer and a metal chair leg, placed a noose around his neck, all the time demanding that he "negotiate" the release of the other hostages. Through physical abuse and constant threats he was eventually induced to sign the..."

United States v. Gorham, supra.

It is clear that the public policy considerations that mandated the denial of giving any effect to the note signed in Gorham are not present in this case. Similarly, respondent's reliance on Stamatiou v. United States Gypsum Co., 400 F.Supp.431 (N.D.Ill. 1975) is misplaced since formal contract principles applicable to transactions between private individuals and corporations are "inapposite to the ends of criminal justice." United States ex rel. Selikoff v. Commissioner of Correction, 524 F.2d 650, 654 (2d Cir. 1975).

Finally, the contention that the petitioners' cooperation was not substantially complete is several years too late in the making. The district court so found (T523). Indeed, Mr. Mackell's letter to the parole board of April 24, 1970 states:

"Solely because of the cooperation of the above-named defendant, practically all of the property taken in that robbery

was recovered." (emphasis added) (43a). The assertion that a substantial portion of the jewels were not returned is an assertion without any evidentiary support. Indeed, the amount of the theft was never proved.

In any event it would seem that a good faith complaint on this point would have been made at or before the time of Mr. Mackell's letter to the parole board. It is difficult to imagine why he would have fulfilled his supposed obligation if the petitioners had not fulfilled theirs.

POINT IV

IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY DEFENDANTS JONES AND OSWALD COSTS WHERE THE ACTION WAS DISMISSED ON MOTION OF THE DEFENDANTS.

Federal Rules of Civil Procedure Rule 54(d) provides in part:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course, to the prevailing party unless the court otherwise directs."

The language "costs shall be allowed as of course to the prevailing party" is not a rigid or inexorable rule but is a matter within the sound discretion of the court. Homestake Mining Co. v. Mid-Continent Exploration Co., 282 F.2d 787 (10th Cir.1960), Northern National Gas Co. v. Grounds, 292 F.Supp 619 (U.S.D.Kansas 1968). Furthermore, where neither party is actually the "prevailing party" the court may be called upon to use even wider discretion in its assessment of cost. The court's discretion,clearly expressed in Rule 54(d). F.R.C.P., extends over allowance, disallowance or apportionment of cost in all civil actions, Kaiser Industrial Corp. v. Mc/Lonth Steel Corp., 50 F.R.D.5 (1970).

Denial of cost to the prevailing party is in the nature of a penalty for some defection on his part in the course

of litigation and should be imposed for such defections except where it is clear that the action was brought in good faith, involving issues as to which the law is in doubt. In such a case the court may in its discretion require each party to bear its own cost ...Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir. 1949) cert denied 338 U.S. 948, 70 S.Ct. 486, 94 L.Ed. 584 (1950). See also Bliss v. Anaconda Cooper Mining Co., C.C., 167 F.1024.

The district court in the instant situation did not abuse its discretion but instead used that discretion which it clearly has to disallow cost in an action where neither party was the actual "prevailing party", since the case was dismissed. Also considered was the fact that the action was brought in good faith by the plaintiffs, believing themselves to have been deprived of their civil rights and even though the defendants did not act in bad faith and should not be penalized, at the very least, the court could require each party to bear its own costs instead of allowing costs to the defendants. Denial of costs appears to be the most equitable remedy, outside of apportioning the costs, under these circumstances. This determination would be well within the purview of Rule 54(d) of F.R.C.P. in which the qualification "unless the court otherwise directs" states an equitable principle...comparable to the principle formerly applying in suits on equity. 6 J Moore, Federal Practice ¶54.70[5].

A case to be distinguished is Popiel Brothers, Inc. v. Shick Electric, Inc. 516 F.2d 772 (7th Cir. 1975). This was a patent infringement action where the trial court held that the patent was invalid and that the defendant neither infringed nor induced its infringement and dismissed the complaint which was silent as to costs. Upon remand, the district court entered a judgment on mandate and assessed costs to the plaintiff. Subsequently the plaintiff was granted a motion to set aside the taxed costs and the defendant's motion was denied for costs and attorneys fees. The defendant appealed and the Court of Appeals held that the mere fact that the plaintiff, as an unsuccessful party, was an ordinary party acting in good faith, it was not in itself sufficient to overcome the presumption that the defendants were entitled to costs as the prevailing parties.

It is clear from the trial court's decision in Popiel Brothers, supra, that the defendant was indeed the prevailing party. The court entered findings of fact that the defendant did not infringe the patent and thus was clearly the decided victor in that case.

In the instant situation there was never any finding of fact because the evidence was insufficient and therefore the case was dismissed. Here, neither party was a victor in such a sense to be considered the actual prevailing party. Because of this, equity requires a different determination. Where neither party is the actual prevailing party, the fact

that the plaintiff was acting in good faith may equitably require the denial of costs to the defendants where the case was dismissed. The district court did use its well established sound discretion in denying costs to the defendants.

POINT V

THE DISTRICT COURT'S DENIAL TO DEFENDANTS JONES AND OSWALD OF ATTORNEYS' FEES IN THE CIVIL RIGHTS ACTION WAS NOT AN ABUSE OF DISCRETION SIMPLY BECAUSE PLAINTIFFS FAILED TO PRESENT CONCRETE STATEMENTS THAT THEY WERE INVOLVED IN A PLEA PROMISE.

Generally attorney's fees are not allowed but it has been held by the United States Supreme Court that if special circumstances exist an award of attorneys' fees may be justified, including reasonable expenses of litigation other than statutory cost. "A federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly or for oppresive reasons'". 6J. Moore, Federal Practice 1154. 77[2] p.1709(2ed. 1972). Hall v. Cole, 412 U.S. 1, 36 L.Ed.2d 702, 93 S.Ct. 1943 (1973), Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964 19 L.Ed.2d 1263 (1968).

In Hall v. Cole, the Supreme Court held that the district court did not abuse its discretion in awarding attorney's fees. Here, the element of bad faith was one of many considerations but the presence or absence of it was not dispositive in the court's award, instead, the court relied on the "common benefit" rationale, another special circumstance whereby attorney's fees may be awarded. Mills v. Electric Auto Lite Co., 396 U.S., 24 L.Ed.2d 593, 90 S.Ct. 616 (1970). Under this rationale counsel fees

awarded because the litigation confers substantial benefits on an ascertainable class of beneficiaries.

In Newman v. Piggie Park Enterprises, supra, the Supreme Court awarded counsel fees under §204(b) of the Civil Rights Act of 1964 not simply to penalize the litigants who deliberately advanced untenable arguments but more so, to encourage individuals injured by racial descrimination to seek judicial relief under the Public Accommodations part of the act. Here again,the "common benefit" rationale is relied on.

Awards of attorneys' fees solely for bad faith prosecutions have been made only where there was a clear indication that the action was unnecessary and compelled by "unreasonable obdurate obstinancy". Class v. Norton, 505 F.2d 123 (2d Cir. 1974). Here a contempt action against the state commissioner of welfare was clearly necessitated by the commissioner's failure to timely process applications for welfare assistance.

In the instant situation, the prosecution of defendants Oswald (former Chairman of the Board of Parole) and Jones (a former Commissioner of Parole) for damages under 42 U.S.C. §1983 (Civil Richts Statute) cannot be deemed a "bad faith" prosecution. The defendant's were not forced to trial because of some "obdurate obstinancy" but instead because the plaintiff Palermo believed he had a valid claim for damages resulting from the deprivation of civil rights. Palermo felt that the fundamental prerequisite of the plea negotiations process, that the representations made

be accurate and that promises made be kept. (United States ex rel. Elksnis v. Gilligan, 256 F.Supp.244 (S.D.N.Y. 1966), had been breached and the standards of fair play implicit in plea negotiations had been violated. The fact that there was no concrete promise made by defendants Oswald and Jones to Palermo is irrelevant to the issue of whether or not plaintiffs' due process rights have been violated. Palermo's understanding that he had a promise of parole was not just a subjective impression but was made on objective categorical statements made by his attorneys, and representatives of the District Attorney's Office, who were intimately involved in the negotiations leading up to the agreement. It is not so important that precise verbatim statements were or were not made but what is of real consequence is that representations were objectively made to indicate to Palermo that there was, indeed, a parole agreement. The fact that the case was not dismissed during pre-trial motions, even though plaintiff's pre-trial memorandum did not claim that the defendants personally made any concrete promises, indicates that the court did not consider the institution of the action to be frivolous.

Just because Palermo's counsel consented to the dismissal of his own case does not necessarily mean that he never had any intentions of presenting a case. This is not an indication of bad faith.

It is clear, then, that since Palermo did not act "in bad faith', vexatiously, wantonly or for oppressive reasons and since the litigation would not confer substantial benefits on an ascertainable class of beneficiaries, the district court's denial of attorney's fees was not an abuse of discretion.

POINT VI

THE JUDGMENT IN FAVOR OF THE DEFENDANTS MACKELL AND LUDWIG WAS APPROPRIATELY ENTERED ON MAY 19, 1976.

Pursuant to Rule 54(b) F.R.C.P. the judgment herein was properly entered May 19, 1976. The petitioners, who were then pro se filed a notice of appeal from Judge Mansfield's order of July 26, 1971 dismissing the amended complaint. Judge Mansfield treated that as an application for permission to appeal from an interlocatory order pursuant to 28 U.S.C. §1292(b) and denied the application on February 25, 1972. Therefore it is clear that final judgment was properly entered May 19, 1976.

As the statement of the case indicates, Mackell and Ludwig knowingly and falsely represented that they had a commitment from the parole board. Their conduct was actionable and the decision dismissing the complaint as to them should be reversed.

CONCLUSION

FOR ALL OF THESE REASONS THE JUDGMENT OF THE DISTRICT COURT GRANTING THE WRIT OF HABEAS CORPUS HEREIN SHOULD BE AFFIRMED AND THE EARLIER OPINION OF THE DISTRICT COURT DISMISSING THE AMENDED COMPLAINT HEREIN AS TO THE DEFENDANTS MACKELL AND LUDWIG SHOULD BE REVERSED, THE COMPLAINT SHOULD BE ORDERED REINSTATED AND THE MATTER REMANDED TO THE DISTRICT COURT FOR TRIAL AS TO THOSE DEFENDANTS.

7/14/76

Respectfully submitted,

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